Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

RANDALL S YOUNG, *ET AL*

Petitioners.

v

MEMORIAL HERMANN HOSPITAL SYSTEM, DOING BUSINESS AS MEMORIAL HERMANN HOSPITAL, *ET AL* ,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1 In a diversity case concerning a traditional, state-law medical-malpractice claim, may a federal court of appeal adopt a rule of causation requiring epidemiological evidence of a doubling of the risk of an unfavorable outcome when the state supreme court has expressly reserved decision on the question, rather than certify that novel and unanswered question to that court?

2. Whether summary judgment may be granted in a medical-malpractice case, despite expert evidence that establishes a prima facie case, on the basis of statistics derived from a single epidemiological study of the general population that is focused on a related but different question, without offending the guarantee of individualized assessment of actual claims and defenses under constitutional principles of due process and access to the courts?

PARTIES TO THE PROCEEDINGS

Petitioners are Randall S Young and Thessa Young, individually, and as next friends of Ashton Young, a minor

Respondents are Memorial Hermann Hospital System, doing business as Memorial Hermann Hospital; Rural/Metro of Texas LP, Hermann Healthcare System; R/M of Texas GP, Inc; Rural/Metro of Texas Inc; Jose Medina, MD; Katrin Y. Takenaka, MD, Stacy MacDonald, RN; and Ali Riedle, RN

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Randall Young and Thessa Young, individually, and as next friends of Ashton Young, a minor, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App A, *infra*, 1a-6a) is reported at 573 F 3d 233. Rehearing was denied by the Fifth Circuit (App B, *infra*, 7a-8a) The judgment of the United States District Court for the Southern District of Texas (App. C, *infra*, 9a-21a) is unreported

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its opinion on June 29, 2009 A timely petition for rehearing en banc was denied on August 27, 2009 The jurisdiction of this Court rests on 28 U.S C § 1254(1)

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment. " . nor be deprived of life, liberty, or property, without due process of law. . . ."

INTRODUCTION

This petition seeks review of a decision by the United States Court of Appeals for the Fifth Circuit, which affirmed an order granting Respondents' motion for summary judgment in a medical malpractice case The Fifth Circuit's decision decided an open and novel question of Texas law specifically reserved for future consideration by the Texas Supreme Court. It then determined the applicable facts based on statistical studies relevant to whether timely treatment would have eliminated or largely eliminated any neurological deficit, rather than credit Plaintiffs' expert testimony based on an individualized determination that timely treatment would have cognizably diminished the neurological injury The approach taken by the Fifth Circuit in this case raises important issues, upon which the Circuits also differ, as to when certification of state law questions should occur, how generalized scientific and medical studies should be treated at the summary judgment stage when used to rebut proffered expert testimony, and when a genuine issue of material fact exists that requires submission to the jury

STATEMENT OF THE CASE

A. Factual Background

Randall S. Young was a healthy, thirty-seven-year-old man from Louisiana, who drove to and attended a motocross event at Reliant Stadium in Houston, Texas, on March 29, 2003. At approximately 6 45 p m , Young left a friend attending the event with him because they were not seated together and agreed to meet again near the

concession stand during intermission, which was expected to take place between 8 30-8.45 p m Emergency personnel from Respondents Rural/Metro of Texas L P , R/M of Texas G P. Inc , and/or Rural/Metro of Texas Inc. received a call at 8 32 p m that Young was in need of assistance after he had begun wandering aimlessly near the concession stand. When the medics arrived two minutes later, Young was on the ground, unable to speak understandably and being attended to by an off-duty fireman Paramedics and Young's friend, Eugene Lipps, soon arrived Observing that Young's behavior was consistent with a stroke, Lipps asked the paramedics about whether Young could be having a stroke and, after calling Young's wife, provided information about high blood pressure medication Young was taking. This information was not documented by the paramedics, nor did they take down the cellphone number of Lipps or a telephone number for Young's wife, Thessa.

The paramedics erroneously chose to follow an "Altered State" protocol in treating Young At 9·03 p m., Young was taken by ambulance to Memorial Hermann Hospital, a designated stroke center four miles away His friend, Lipps, did not accompany him to the hospital Young arrived at the hospital's emergency room at 9·15 p.m No proper history was taken at the emergency room, and no notification was made to the hospital's stroke team Young was treated as having an altered mental state, suggesting serious alcohol or drug-induced impairment

At 10:10 p m , a CT scan was administered to Young The scan was interpreted as negative,

indicating no stroke. Later, Young was transferred to an intermediate care unit within the hospital without a definite diagnosis Another scan was administered and interpreted at 3·21 a m resulting in an accurate diagnosis of an ischemic stroke. Such a stroke is caused by a blood clot Had the correct diagnosis been made on a timely basis, protocol would have called for the healthcare providers to administer an intravenous tissue plasminogen activator, t-PA, which was approved in 1996 by the Food and Drug Administration as the only drug therapy for acute ischemic stroke, like the one Young suffered The FDA regards it as a safe and effective treatment for stroke if it is given within three hours after the onset of symptoms of stroke as long as the patient is at least 18 years old and is negative for intracranial hemorrhage The drug dissolves blood clots It is undisputed that Young had qualified for t-PA therapy if it had taken place within the three hour window

By the time a correct diagnosis was made, it was too late to administer t-PA Young suffered catastrophic injuries from his stroke He is severely and totally disabled, unable to speak beyond few words He has limited ability to walk and will never be able to live independently or engage in gainful employment His ability to interact with his son, Ashton, and his wife, Thessa, is dramatically limited Young will require 24-hour daily assistance for the rest of his life

B. Proceedings Below

Young, his wife, Thessa, individually and as next friends for their son, Ashton, brought suit in

federal court, invoking diversity jurisdiction, against Respondents for their failure to follow proper procedures, diagnose Young's condition properly, and treat him, resulting in a more severe impairment than he might otherwise have suffered The Youngs proffered three experts, whose expert reports, affidavits, and deposition testimony, established their view that administration of t-PA would have led to an improved outcome for Mr Young within reasonable medical probability (R 5271-72, 5292-93; 5227-28, 5336, 5496-97, 5507-08, 5551, 5557-58, and 6220-21). Although they acknowledged the 1995 study that the Fifth Circuit relied upon, they uniformly testified that in order to determine the probable outcome for a particular patient, one must examine the particular facts and circumstances of that patient's presentation After extensive discovery, and on the eve of trial, the District Court granted summary judgment in favor of the Defendant-Respondents For purposes of summary judgment, the District Court held that Petitioners had satisfied the necessary elements of duty, breach of the applicable standard of care, and existence of a compensable injury Still, the District Court questioned whether a causal connection was established between Young's injury and the alleged negligence.

The District Court described the evidence as establishing

> a largely uncontroverted picture of missed opportunities on the part of the medical emergency personnel, the triage nurse, the emergency room doctors and nurses, and the readers of the CT scan

> to gain and process information about Young's condition that would have lead to the administering of tPA during the three hour time window from onset of his stroke

App 13a

Plaintiffs relied upon expert opinions of three physicians whose deposition testimony and expert reports indicated that t-PA therapy would have improved Young's chances for a better neurologic outcome to a reasonable medical probability. Although the Court did not strike the Youngs experts, it found that "reliable, peer reviewed medical literature" established that "tPA, when used correctly, provided an 11 to 13 percent increased chance of avoiding neurologic injury" and that Young's experts, at deposition, were unable to proffer studies that put a patient's chances of a better outcome with the administration of t-PA, after three months, any better than 33 percent App. 16a Because 33 percent was less than 51 percent, the threshold the court utilized for "more likely than not," the District Court ruled, as a matter of law, that Young had not and could not show he "had a 51 percent or greater chance of avoiding his severely disabled condition had he received tPA treatment at Hermann Hospital" and granted summary judgment against him. App 21a.

The Youngs appealed The Fifth Circuit's opinion properly recited the Texas requirement that medical-malpractice plaintiffs must show a "reasonable medical probability" that defendants caused the injury App 3a. It then relied upon a

Texas *product liability* ruling to hold that what was required was "a more than 50% probability that a defendant's wrongful conduct caused the harm or injury" supported by epidemiological evidence that the risk was doubled by the wrongful conduct. App. 4a n.5.

Ignoring record evidence that, more likely than not, Randy Young would have benefited from t-PA therapy, the Fifth Circuit declared it "undisputed that there is reliable scientific evidence that timely administration of t-PA" is beneficial to some patients but not others, while some stroke victims recover without t-PA. Examining what the Fifth Circuit characterized as Young's "best evidence," the Fifth Circuit recognized that a 1997 subgroup analysis established that "Young's likelihood of a very favorable outcome" with treatment was approximately 59%. App. 5a. Noting that the same outcome was observed 42 percent of the time without t-PA treatment, the Fifth Circuit then reversed the numbers to arrive at the risk of an unfavorable outcome: 41 percent of the time for stroke victims treated with t-PA and 58 percent of the time for those treated with a placebo App. 6a. Because "failure to treat with t-PA did not result in a more than doubling of the risk of an unfavorable outcome," the Fifth Circuit affirmed the summary judgment as foreclosing any favorable finding on causation.

REASONS FOR GRANTING THE PETITION

This case raises several important issues on which the lower federal courts would benefit from this Court's guidance. First, the Circuits are in

conflict on the important national issue of when they should create new state law even when certification to a state's highest court is available. Second, in evaluating scientific evidence at the summary judgment stage, the Circuits are in conflict about the status and stature of generalized empirical evidence submitted as rebuttal evidence and its impact on case-specific expert evidence, particularly at the summary judgment stage This case presents an opportunity to establish a consistent approach to these questions

I. The Circuits Have No Consistent Standards for Determining When a State Law Issue Should be Certified to a State Supreme Court Willing to Accept Queries Concerning Novel Questions

When a federal district court sits on a matter on the basis of its diversity jurisdiction, it acts as another court of that state. *Guaranty Trust Co. v. York*, 326 U.S 99, 108-09 (1945). The results it reaches, both as a matter of comity and fundamental fairness, should be substantially the same as would be reached by a court in that state *Id.* at 109 While the federal courts have at times proven adept at reading a state's case law and answering certain questions that the state courts themselves have not resolved, other novel legal questions require guesses based on material that might charitably be described as enigmatic at best As a result, this Court has flatly stated that "[f]ederal courts lack competence to rule definitively on the meaning of state legislation." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997) The same is true for the extension of judicially devised common-law standards.

Whereas *Pullman* abstention was designed to "avoid federal-court error in deciding state-law questions," certification of questions covers much the same territory today *Id* at 75-76 Justice Stevens recently observed that "principles of federalism and comity favor giving a State's high court the opportunity to answer important questions of state law, particularly when those questions implicate uniquely local matters" which "require the weighing of policy considerations for their correct resolution" *Town of Castle Rock v. Gonzales*, 545 U.S 748, 777 (2005) (Stevens, J , dissenting) (footnote omitted) Justice O'Connor similarly noted that speculation by a federal court about the meaning of state law "is particularly gratuitous when the state courts stand willing to address questions of state law on certification from a federal court" *Brockett v Spokane Arcades, Inc.*, 472 U S 491, 510 (1985) (O'Connor, J., concurring)

The authors of the leading treatise on federal civil procedure echo those sentiments, questioning the tendency of federal courts to go beyond where the state courts have gone and thereby "undermin[ing] the ability of the federal courts to ensure that the outcome of the litigation be substantially the same as it would be if tried in a state court and subjected to that system's appellate process" 17A Charles Wright, Arthur Miller, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 4507 (2d ed 1988)

This expressed concern is not an idle worry *See, e g , Farmland Indus , Inc. v. Republic Ins. Co.*, 941 S W 2d 505, 510 (Mo 1997) (finding that the Eighth Circuit erred on Missouri law in *Cont'l Ins Cos. v Ne. Pharm & Chem Co* , 842 F 2d 977, 985-

87 (8th Cir 1988) (en banc)), *Bausch & Lomb, Inc v. Utica Mut Ins. Co.*, 625 A 2d 1021 (Md 1993) (finding the Fourth Circuit erred on Maryland law in *Maryland Cas. Co. v Armco, Inc* , 822 F.2d 1348 (4th Cir 1987)) Judge Sloviter has documented many similar errors by the Third Circuit. *See* Dolores K Sloviter, *A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism*, 78 VA L REV. 1671, 1679-80 & nn 48-51 (1992) (collecting erroneous "*Erie* guesses" by the Third Circuit)

Moreover, it implicates the fundamental fairness of a process in which jurisdiction over state issues is lodged in federal court Correction at a later date by a state's high court does nothing for the party against whom the error proved fatal to their cause *See, e g , DeWeerth v Baldinger*, 38 F 3d 1266, 1272-75 (2d Cir 1994) (holding that Rule 60(b) relief is unavailable when a federal court's prediction of state law is explicitly rejected by the state's highest court)

Forty-seven states, the District of Columbia, and Puerto Rico have established procedures by which federal judges can certify a state-law question for determination to the state's highest court Rebecca A Cochran, Federal *Court Certification of Questions of State Law to State Courts A Theoretial and Empirical Study*, 29 J. LEGIS 157, 159 (2003), *see also* 17A Wright, Miller, *supra*, § 4248 Pursuant to Article 5, Section 3-C of the Texas Constitution and Rule 58 of the Texas Rules of Appellate Procedure, federal appellate courts may certify a question of state law for which there exists no controlling authority and no consistent rationale in

lower courts' decisions on the question The Fifth Circuit could have availed itself of this procedure

Certification process is also a process that this Court has utilized. *See, e g., Fiore v White*, 528 U S 23 (1999) (question about retroactive effect to Pennsylvania Supreme Court), *Virginia v Am Booksellers Ass'n*, 484 U S. 383, 395-97 (1988) (question about regulation of materials that may be viewed by juveniles to Virginia Supreme Court), *Zant v Stephens*, 456 U S 410, 416-17 (1982) (question about administration of death penalty to Georgia Supreme Court), *Bellotti v. Baird*, 428 U S 132, 150-52 (1976) (holding that district court should have certified certain state-law questions to Massachusetts Supreme Judicial Court, and identifying additional questions that would also be appropriate for certification)

Unlike the Fifth Circuit, the Second Circuit has long embraced this Court's preference for certifying new and novel questions of state law *Filor, Bullard & Smyth v Ins Co. of N Am* , 605 F 2d 598, 602-04 (2d Cir 1978) (calling it the "preferred practice"); *see also Essex Universal Corp v Yates*, 305 F 2d 572, 580-82 (2d Cir 1962) (Friendly, J) (urging that federal courts leave doctrinal developments to state courts in areas of particular state importance). In the context of federal constitutional litigation, the Second Circuit has developed a six-factor test to determine when certification is warranted, weighting the factors decidedly in favor of certification The test considers (1) whether authoritative state court interpretations exist, (2) whether the issue is important to the state and likely to recur, (3) whether serious constitutional

difficulties could be avoided by any construction of the question at issue, (4) whether certification will resolve the litigation, render federal constitutional decisions unnecessary, or solidify the propriety of the case being in federal court, (5) whether federalism is implicated, particularly if a federal court decision potentially interferes with core matters of state sovereignty; and (6) whether certification would result in undue delay *Tunick v Safir*, 209 F.3d 67, 81 (2d Cir 2000)

Other Circuits, however, have created an opposing preference and engage in what they accurately characterize as an "*Erie* guess" of what the state courts may hold *See Howe ex rel. Howe v Scottsdale Ins Co* , 204 F 3d 624, 627 (5th Cir 2000) ("If the Louisiana Supreme Court has not ruled on this issue, then this Court must make an 'Erie guess' and 'determine as best it can' what the Louisiana Supreme Court would decide ") (citation omitted). *See also Combs v. Int'l Ins Co* , 354 F.3d 568, 577 (6th Cir. 2004) ("[H]ighly uncertain area of state law, forc[es] us to make an educated '*Erie* guess.'")

The Fifth Circuit, which guessed at what the Texas courts might hold here, has put especially strong faith in the "*Erie*-guess" approach, employing it with a frequency not evident in an electronic search of other circuits. *See, e g , Beavers v Metropolitan Life Ins Co* , 566 F.3d 436, 439 (5th Cir. 2009) ("If no state court decisions control, *we must make an "Erie guess"* as to how the Texas Supreme Court would apply state law ") (emphasis added and citing *Travelers Cas. & Sur. Co of Am v Ernst & Young LLP*, 542 F.3d 475, 483 (5th Cir. 2008)), *Guaranty Nat'l Ins Co. v Azrock Indus Inc* ,

205 F 3d 253, 259 (5th Cir 2000) (requiring courts to make its "best *Erie* guess."), *overruled by OneBeacon Ins Co. v Don's Bldg Supply, Inc*, 553 F 3d 901, 903 (5th Cir 2008) (after Texas Supreme Court rejected Fifth Circuit's guess in *Don's Bldg. Supply Inc. v. OneBeacon Ins Co*, 267 S W 3d 20 (Tex 2008), on certified questions)

In assaying a state court's ruling on a novel issue, the Fifth Circuit has said it "may consider, among other sources, treatises, decisions from other jurisdictions, and the 'majority rule.'" *SMI Owen Steel Co, Inc v Marsh USA, Inc*, 520 F 3d 432, 437 (5th Cir 2008) (quoting *Am Indem Lloyds v Travelers Prop. & Cas. Ins. Co*, 335 F 3d 429, 435 (5th Cir 2003)) The Circuit even goes so far as to "presume that the [state] courts would adopt the prevailing rule" from other jurisdictions *Id* (citation omitted)

Other Circuits have adopted a similar approach, permitting courts sitting in diversity to consider "all relevant data," *Kingsley Assoc, Inc. v Moll PlastiCrafters, Inc*, 65 F 3d 498, 507 (6th Cir. 1995), including jurisprudence from other jurisdictions, *Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1090 (7th Cir 1999)[1] (both cited

[1] Like many Circuits, the Seventh Circuit has exhibited something of a multiple personality on the issue of certification *See Railway Express Agency, Inc v Super Scale Models, Ltd*, 934 F 2d 135, 138 (7th Cir 1991) (commending district court for refusing to predict the rulings of courts in New York and Wisconsin on the relevance of a Restatement on interference with a contract, even though both states' courts have acknowledged such interference as a common-law tort)

in *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004)), *see also On Air Entm't Corp. v. Nat'l Indem. Co.*, 210 F.3d 146, 150 (3d Cir. 2000) (may consider other state court decisions, federal decisions, weight of decisions, and general trend of authority). In fact, the Seventh Circuit has eschewed certification on the theory that it "would overwhelm the capacity of the state's highest court," *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993), a determination at odds with this Court's declaration that certification leads to "reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official English*, 520 U.S. at 76.

Still other circuits, besides the Second Circuit, are disdainful of the "*Erie*-guess" approach. For example, the Eleventh Circuit has repeatedly held, "'[w]here there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret or change existing law.'" *Trans Coastal Roofing Co., Inc. v. David Boland, Inc.*, 309 F.3d 758, 761 (11th Cir. 2002) (quoting *Mosher v. Speedstar Div. of AMCA Intern., Inc.*, 52 F.3d 913, 916-17 (11th Cir. 1995). *Cf. Whyte v. Connecticut Mut. Life Ins. Co.*, 818 F.2d 1005, 1012 n.22 (1st Cir. 1987) (refusing to "hazard[] an *Erie* guess"), *Cooper v. Lab. Corp. of Am. Holdings, Inc.*, 150 F.3d 376, 380 (4th Cir. 1998) (choosing not to make an *Erie* "guess"); *Athridge v. Aetna Cas. & Sur. Co.*, No. Civ. A. 96-2708, 2001 WL 214212 (D.D.C. Mar. 2, 2001), *aff'd*, 351 F.3d 1166 (D.C. Cir. 2003) (holding that federal courts should be reluctant to

adopt legal principles from other jurisdictions that the District of Columbia courts may not adopt)

Although the Seventh Circuit, like the Fifth, ranges broadly in predicting state supreme court holdings, *Alper v. Altheimer & Gray*, 257 F 3d 680, 688 (7th Cir 2001) (considering decisions from other jurisdictions), it has also recognized that "[c]ertification of a controlling issue of state law to the highest court of the state is one method of reducing the possibility of error in making an "*Erie* guess" *Allstate Ins Co. v Menards, Inc*, 285 F 3d 630, 638 (7th Cir. 2002).

Here, the Fifth Circuit engaged in true speculation to reach its conclusion about Texas law The contours of any substantive causation rule was expressly reserved by the Texas Supreme Court for a later day in the very decision the Fifth Circuit cited as authority for adopting the 2 0 rate ratio requirement, *Merrell Dow Pharm, Inc v Havner*, 953 S W 2d 706, 719 (Tex 1997) ("We need not decide in this case whether epidemiological evidence with a relative risk less than 2 0, coupled with other credible and reliable evidence, may be legally sufficient to support causation"). *See also Cano v Everest Minerals Corp.*, 362 F Supp 2d 814, 821 (W.D Tex. 2005) (acknowledging that the Texas Supreme Court left open the question) Moreover, the *Havner* court recognized that other factors must be considered because "epidemiological studies only show an association" 953 S W 2d at 718. Recognizing the need for individualized proof, *Havner* states that in some high-risk cases there "may in fact be no causal relationship," while "even if a particular study reports a low relative risk, there may in fact be a

causal relationship." *Id.* The Fifth Circuit ignored this. Here, Randy Young's youth and otherwise good health, as his experts testified, made it more likely than not that t-PA treatment would have limited the neurological deficits he now suffers.

Any decision about the burden of proof, this Court has long held, is a "'substantive' aspect of a claim." *Raleigh v. Ill. Dept. of Revenue*, 530 U.S. 15, 21-22 (2000), and the substantive law in a case before a federal court on diversity grounds is state law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.").

Unfortunately, as one scholar has observed, federal courts have begun to fashion substantive rules of causation through evidentiary decisions with increasing frequency. *See* Lucinda M. Finley, *Guarding the Fate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335 (1999) ("Under the guise of admissibility determinations, federal judges have been making significant substantive legal rules on causation by substantially raising the threshold of scientific proof plaintiffs need to get their expert causation testimony admitted, and thus survive summary judgment.").

Given the stakes, the expense that the parties have undertaken to develop expert testimony, the

constitutional imperatives of access to the courts, due process, and due respect for our federalist design, litigation should not be determined by as flimsy a standard as *Erie* guesswork Where the relevant state law is unclear, where the federal court is asked to import a doctrine from one area of state law into another where the state courts have not ventured, certification provides a better means of proceeding This Court's guidance is needed to prevent the certification decision from being entirely idiosyncratic, depending both upon which circuit entertains the case or which panel is drawn within a circuit No discernible standards now animate this issue of law

II. The Court Should Grant Certiorari to Resolve a Conflict in the Treatment of Summary Judgment Based on Statistical Evidence of a Generalized Nature, an Issue of Great National Significance

When a case is "decided on summary judgment, there have not yet been factual findings by a judge or jury." *Scott v. Harris*, 550 U S 372, 378 (2007) To determine whether a factual dispute exists, "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion'" *Id* (quoting *United States v Diebold, Inc.*, 369 U.S 654, 655 (1962) (*per curiam*)), *Saucier v. Katz*, 533 U S 194, 201 (2001); *see also* Fed R Civ P. 56(c) What is true of qualified immunity cases is true of all defense motions for summary judgment. "this usually means adopting the plaintiff's version of the facts." *Id.*

It is only "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," that a "'genuine issue for trial'" does not exist so that a court can take the case away from the jury through summary judgment. *Matsushita Elec Indus Co , Ltd. v Zenith Radio Corp* , 475 U S 574, 586-87 (1986) (citation omitted). Thus, for example, where unimpeachable evidence of the applicable facts to the dispute before the court is part of that record, this Court has recognized that summary judgment is warranted In *Scott*, for example, a factual dispute existed between the parties about whether a party had been driving in a dangerous fashion An indisputably accurate videotape of the police chase showed that the injured driver's version of the facts was plainly erroneous, leaving no determination about credibility or weight of the evidence for a factfinder to review

Still, as this Court has emphasized, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict" *Anderson v. Liberty Lobby, Inc.*, 477 U S. 242, 255 (1986), *see also id.* at 249 ("at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter") Moreover, this Court stated that the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id* at 255. (citing *Adickes v. S.H Kress & Co* , 398 U S 144, 158-59 (1970))

The appropriate judicial inquiry at summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury . . . that one party must prevail as a matter of law." *Id.* at 251-52. Ever since the issuance of the summary-judgment trilogy,[2] courts of appeal throughout the nation have struggled with this standard. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (finding that too often courts are too anxious to dispose of cases, undermining litigants' rights to a day in court and jury trial and suggesting further Supreme Court guidance is needed on summary judgment to prevent trial courts' discretion from eclipsing fundamental rights). Judge Patricia Wald reacted to this trend by suggesting that courts of appeal must ensure that

> summary judgment stays within its proper boundaries, rather than encouraging its unimpeded growth. Its expansion across subject matter boundaries and its frequent conversion from a careful calculus of factual disputes (or the lack thereof) to something more like a gestalt verdict based on an early snapshot of the case have turned it into a potential juggernaut which, if not carefully

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[2] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

> monitored, could threaten the relatively small residue of civil trials that remain

Patricia M Wald, *Summary Judgment at Sixty*, 76 TEX L REV 1897, 1917 (1998)

Here, relying on a single empirical study conducted of a general population sample, the Fifth Circuit decided that t-PA would have insufficiently assisted Mr. Young to consider the many failures of Respondents a proximate cause of the extent of his catastrophic injuries, despite record evidence that Young was the type of patient who should have received t-PA (R 5496, 5557, 6219-20) Thus, the failure to administer t-PA on a timely basis, despite its FDA certification as safe and effective, was of no consequence to Mr Young or to anyone else with a stroke under this ruling. The decision and the bright-line epidemiological test adopted by the Fifth Circuit tells emergency care personnel and health-care providers they are licensed to dither, misread tests, and fail to administer t-PA, even when they determine it is the appropriate course of action, because the court believes that definitive scientific evidence indicates that causation cannot be proven, regardless of the testimony of experts familiar with the stroke victim's actual situation

In projecting Texas's treatment of products liability law into the realm of medical malpractice, the Fifth Circuit adopted a substantive rule of causation—specifically, the rate ratio necessary to establish causation when a health-care provider fails to administer t-PA within three hours of the onset of a stroke to an eligible stroke victim Based on just one epidemiological study of the general population,

the court concluded that a rate ratio of 2 0 or greater is necessary to establish causation Consequently, the court treated Petitioners' other evidence, including expert testimony geared to Mr Young's specific circumstances as irrelevant, because it was contrary to the generalized epidemiological evidence

A. The Fifth Circuit's Treatment of Statistical Evidence Relating to the General Population Conflicts with Decisions of this Court and the Right to an Individualized Determination of the Applicable Facts

The Due Process Clause guarantees the right to be heard "'at a meaningful time and in a meaningful manner'" *Mathews v Eldridge*, 424 U S 319, 333 (1976) (citation omitted). Meaningful review includes an opportunity to present an individualized claim or defense and have the individual merits fairly judged. *Logan v Zimmerman Brush Co.*, 455 U.S 422, 433-34 (1982); *see, e g , S Cent. Bell Tel Co. v Alabama*, 526 U S. 160, 168 (1999) (application of *res judicata* violated due process where original plaintiffs had not understood themselves to be acting in a representative capacity and there had been no special procedures to safeguard the interests of absentees); *Richards v Jefferson County*, 517 U S 793, 798 (1996) (holding that the Alabama Supreme Court's application of *res judicata* to nonparties in the absence of any special procedures to protect their interests violated due process), *Mullane v Cent Hanover, Bank & Trust Co.*, 339 U.S 306, 314 (1950) ("[R]ight to be heard has little reality or worth unless *one* is informed that the matter is pending and can

choose for *himself* whether to appear or default, acquiesce or contest" (emphasis added))

Thus, in the class-action context, this Court has jealously guarded the right of individuals to "opt-out" of class adjudication *Phillips Petroleum Co. v Shutts*, 472 U S 797, 812 (1985)

In the context of the death-penalty, this Court has examined statistical studies of racial disparity and found them, standing alone, insufficient to establish that the sentence was the product of invidious discrimination In *McCleskey v Kemp*, 481 U.S 279, 286 (1987), a death-row inmate proffered two sophisticated statistical studies that supported his claim that Georgia juries had handed out death sentences disparately to white and black defendants In rejecting the studies as sufficient evidence of a constitutional violation, this Court noted that "[e]ven a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into . any particular sentencing decision" *Id* at 292 n 7. To prevail, the petitioner had to "prove that the decisionmakers in his case acted with discriminatory purpose." *Id* at 292 Instead, the Court found he offered "no evidence specific to his own case." *Id* Emphatically, this Court held that the unique circumstances of the facts in each specific case, rather than broad statistical variations, are the gist of our system of justice *Id* at 294

Similarly, in its preclusion jurisprudence, this Court has adhered to traditional notions of privity to

protect the rights of individuals to have their own day in court. *Hansberry v Lee*, 311 U.S 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process"), *accord Taylor v. Sturgell*, 128 S Ct 2161 (2008), *see also Coe v Armour Fertilizer Works*, 237 U S. 413, 424 (1915) ("To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result")

Though the Fifth Circuit took the statistical outcome of a single study as gospel,[3] this Court has recognized that "statistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may be rebutted" *Int'l Bhd of Teamsters v. United States*, 431 U S 324, 340 (1977) Alone, such a study and its attendant statistical

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[3] The study that formed the basis of the Fifth Circuit's ruling was the National Institute of Neurological Disorders and Stroke t-PA Stroke Study Group, *Tissue Plasminogen Activator for Acute Ischemic Stroke*, 333 NEW ENG J OF MED 1581 (1995) As the study itself states, the relevant portion was designed, in part, to assess the "primary hypothesis" of whether there was a "consistent and persuasive difference between the t-PA and placebo groups in terms of the proportion of patients who recovered with minimal or no deficit three months after treatment *Id* at 1582 It was not designed to examine whether t-PA treatment would result in an improved neurological outcome and thus, as evidence of causation in this matter, has extremely limited materiality

profile of the general population, when met with expert evidence of the type proffered by the Plaintiffs here, should not result in dismissal of their case at summary judgment At best, statistics have a limited role *See Pitre v. W Elec Co.*, 843 F 2d 1262, 1267 (10th Cir 1988) (recognizing that "statistics may be useful to show differences in treatment and to establish a pattern and practice," but have limited import to be meaningful in actual litigation)

Decisions on summary judgment necessarily must be case-, fact-, and law-specific *See Scott*, 550 U S. at 386 (Ginsburg, J , concurring). To conclude, as the Fifth Circuit did, on population-based epidemiological evidence, which speaks to general causation, that specific causation may not be established as a matter of law through other scientifically valid evidence, violates the due process right of Petitioners to have the merits of their specific case fairly judged [4] Such due-process considerations have been respected in the class action context insofar as defendants' rights to individualized determinations of issues or defenses are concerned—including causation *E.g*, *McLaughlin v. American Tobacco Co* , 522 F 3d 215, 223 (2d Cir 2008) (requiring reliance on

[4] That is not to say that Due Process guarantees a merits determination, it does not *Logan*, 455 U S at 434 n 7, *Boddie v Connecticut*, 401 U S 371, 378 (1971) ("Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits ") But, for instance, in the absence of any procedural missteps, due process does require that the individual "merits [be] fairly judged " *Logan*, 455 U S at 434 n 7, *see also Hammond Packing Co v Arkansas*, 212 U S 322, 351 (1909)

misrepresentation to be established on an individualized, not class, basis, and rejecting class claimant distribution scheme out of concern for due process rights of defendants), *Cimino v Raymark Indus.*, 151 F 3d 297, 300 (5th Cir 1998) (reversing judgment based on extrapolation of average of 160 verdicts to other plaintiffs with same disease), *In re Fibreboard Corp* , 893 F 2d 706, 710 (5th Cir 1990) (procedure whereby claims of individual class members are not adjudicated in individual jury trials implicates defendants' right to due process), *Arch v. Am. Tobacco Co , Inc.*, 175 F R D 469, 489 n 21 (E.D Pa 1997) ("In addition, the Court also concludes that the use of questionnaires to establish the elements of causation and injury-without cross-examination or rebuttal evidence-would violate defendants' due process rights "), *see generally* 2 MCLAUGHLIN ON CLASS ACTIONS § 8·16, at 8-95 (3d ed Dec 2006 update) ("Courts have repeatedly rejected the use of fluid recovery as a substitute for individualized proof when the class pursues claims that require proof of actual damages ")

By contrast there is a lack of appreciation for the analytically-indistinct due-process right of plaintiffs to establish elements of a cause of action through individualized proof—especially in contesting observations about general causation in epidemiological studies by means of other scientifically valid evidence or expert testimony concerning specific causation.

What is more, this pre-trial weighing of the evidence on causation significantly implicates the Seventh Amendment right to trial by jury, which applies in diversity cases concerning tort actions for

monetary damages (*i e* , actions at law) such as this. *Simler v. Conner*, 372 U S 221 (1963), *see also Gasperini v Center for Humanities, Inc* , 518 U S 415 (1996) These substantive rules of causation, therefore, deny plaintiffs, such as Petitioners, an opportunity to have facts tried by a jury The Seventh Amendment gives added dimension to the due-process claim described above and further supports this Court's review

B. Isolated Consideration of an Empirical Study as a Basis for Summary Judgment Lacks Reliability

Contrary to the Fifth Circuit's ruling, it is "widely acknowledged and heeded within the scientific community" that it is "inappropriate[ ] to rely solely "on a single scientific methodology for determining causation " David Egilman, *et al* , *Proving Causation. The Use and Abuse of Medical and Scientific Evidence Inside the* Courtroom—*An Epidemiologist's Critique of the Judicial Interpretation of the* Daubert *Ruling*, 58 FOOD & DRUG L J. 223, 234 (2003) (specifically referring to epidemiologic studies demonstrating a doubling of the rate ratio). Yet, the Fifth Circuit, like many federal courts, took the view that a study that fails to demonstrate a "doubling of the risk" permits the conclusion, as a matter of law, that it is more likely than not that their exposure to an agent cannot have caused the injury In "lost chance" cases, they hold that if epidemiological evidence does not demonstrate that the relative size of the residual baseline risk (here, from the stroke) exceeds the defendant-caused risk (here, the failure of

Respondent to administer t-PA in a timely manner), plaintiffs cannot, as a matter of law, establish causation by a preponderance of the evidence. In either situation, courts bar the introduction of other medical evidence or expert testimony that is contrary to or inconsistent with epidemiological studies, finding such other evidence, including molecular modeling, pathological reports, or animal testing, to be "irrelevant" *E.g., Daubert v Merrell Dow Pharms , Inc* , 43 F.3d 1311 (9th Cir 1995)

Within the scientific community, however, it is well understood that "the entire rate-ratio-of-two argument is based on methodological error." 58 FOOD & DRUG L.J at 231 (citing Sander Greenland, *Relation of Probability of Causation to Relative Risk and Doubling Dose A Methodological Error that has Become a Social Problem*, 89 AM J PUB HEALTH 1166 (1999)); *see also* David W Barnes, *Too Many Probabilities Statistical Evidence of Tort Causation*, 64 LAW & CONTEMP PROBS 191 (2001) ("The lack of congruity between legal and scientific standards is most egregious when testimony based on statistical/scientific methods is used to prove causation in tort law.").

In addition, in the scientific community, "epidemiological evidence is not evaluated in isolation from other sources of information," 58 FOOD & DRUG L.J. at 231, as the Fifth Circuit held it should be *See also Hall v Baxter Healthcare Corp* , 947 F Supp 1387 (D. Or 1996) (rejecting all scientific evidence, even if scientifically valid, on the issue of causation if it does not rest on epidemiology with a relative risk greater than 2 0). Rather, the scientific community understands the limitations of

epidemiology and recognizes that "population-based epidemiology must be used in conjunction with other disciplines, such as molecularly-based sciences." 58 FOOD & DRUG L J at 231, *see also* Peter Schuck, AGENT ORANGE ON TRIAL (1986) (criticizing the elevation of epidemiology as foundational to causation as contrary to scientific understanding) A few courts, though, have recognized the inadvisability of relying on such strict adherence to the 2 0 relative ratio regime *See Miller v. Pfizer, Inc.*, 196 F Supp 2d 1062, 1079 (D Kan 2002) ("Court rejects Pfizer's argument that unless Zoloft is shown to create a relative risk [of akathisia] greater than 2.0, [expert's] testimony is inadmissible"), *aff'd*, 356 F 3d 1326 (10th Cir), *cert denied*, 543 U S. 917 (2004), *Magistrini v One Hour Martinizing Dry Cleaning*, 180 F Supp 2d 584, 606 (D N J. 2002) ("[A] relative risk of 2 0 is not so much a password to a finding of causation as one piece of evidence, among others for the court to consider in determining whether an expert has employed a sound methodology in reaching his or her conclusion "), *Pick v. Am. Med Sys , Inc.*, 958 F Supp 1151, 1160 (E.D La 1997) ("A relative risk above 1 0 is statistically significant, even if not sufficient, by itself, to establish causation by a preponderance of the evidence ")

C. Strict Reliance on Epidemiological Studies Showing a Rate Ratio of Two or Greater Violates the Due Process Clause by Denying Plaintiffs an Individualized Assessment of the Elements of Their Claims

It is undeniable that causation may in fact be lacking in a case where there is a high statistical risk involved, *and* may be present in a case where the statistical risk factor is low Adopting the bright-line rule of requiring a 2.0 or greater risk ratio, and thus an absolute benefit analysis, as the Fifth Circuit did, runs counter to the scientific method and to our civil justice system's insistence on individualized assessments of the facts and applicable law *See* Steve Gold, *Causation in Toxic Torts. Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L J. 376, 379, 390-92 (1986) (explaining how statistical approaches to causation substantively alters causation law) In fact, the Reference Manual on Scientific Evidence itself cautions courts about relying too heavily on general population epidemiologic studies in individual cases Michael D Green, *et al.*, *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 335 (Fed Jud. Ctr 2d ed 2000) ("[E]mploying the results of group-based studies of risk to make a causal determination for an individual plaintiff is beyond the limits of epidemiology.")

Courts are inconsistently treating epidemiological studies with a rate ratio of two when considering whether a plaintiff has established

causation At times, courts follow the doubling-of-the-risk rule described above, leading them to conclude as a matter of law whether causation has or has not been established. *See, e g , Allison v McGhan Med Corp* , 184 F 3d 1300, 1325 (11th Cir 1999) (affirming district court's rejection of epidemiological studies as unreliable because with a relative risk below 2.0 there cannot be a consensus in the general scientific community that an association exists), *Daubert v Merrell Dow Pharms., Inc* , 43 F 3d 1311 (9th Cir 1995) (on remand from this Court, concluding that, in light of the preponderance-of-the-evidence standard, only epidemiology that showed a relative risk of 2 0 or greater could meet the "fit" or relevance consideration articulated by this Court) Other times, courts refuse to treat such studies as dispositive on the issue of causation. *Pick v Am. Med Sys , Inc* , 958 F Supp 1151, 1160 (E D La 1997) (rejecting argument that epidemiology with a relative risk greater than 2 0 is required to admit general causation testimony) *See also supra* at 27-28 (citing additional examples) These are conflicting normative judgments regarding the threshold level of relative risk at which causation may be said to be proved or disproved as a matter of law.

Without individualized consideration—and therefore without consideration of the totality of the evidence—the worst fears about misuse of summary judgment will occur because the only existing epidemiological study—here, one dating back to 1995—might indicate that fewer than a 2:1 ratio of patients would have benefited from the medical treatment that constitutes the standard of care within the profession The implications for the due-

process guarantee of fundamental fairness and a meaningful hearing at a meaningful time are profound

Thus, where there is evidence of probative value to support the plaintiffs' rendition of the facts, summary judgment is inappropriate Here, it is difficult to see how Petitioners' evidence was not sufficient to enable Plaintiffs bearing a mere preponderance burden to establish a prima facie case enabling them to get to the jury, and thus sufficient to withstand Defendants' summary judgment motion

III. The Decision Below Is Incorrect

It is useful to review Texas law to demonstrate why the Fifth Circuit's extrapolation of it is incorrect Because no appeal lies to the Texas Supreme Court to correct the Fifth Circuit's gross error, this review demonstrates the wisdom of certifying such questions rather than engaging in *Erie* guesses

In a Texas medical-malpractice case, a plaintiff must prove, by direct or circumstantial evidence. (1) that the physician-defendant breached the standard of care, meaning that the doctor did not employ the skill or treatment that a reasonably prudent member of the medical profession would have taken under the same or similar circumstances), and (2) that the breach was the proximate cause of the plaintiff's injuries, meaning that there is a reasonable medical probability that the plaintiff's injuries were caused by the negligence of one or more of the defendants. *Duff v Yelin*, 751

S W 2d 175, 176 (Tex 1988), *Hood v Phillips*, 554 S.W 2d 160, 165 (Tex. 1977)

Expert testimony from a doctor of the same school of practice as the defendant is ordinarily sufficient *Hood*, 554 S W.2d at 165-66 Proximate cause is established through foreseeability, *i.e*, that the defendant should have anticipated the danger that resulted from his or her negligence; *and* cause-in-fact, *i e.*, that the defendant's negligence was a substantial factor in bringing about the injury and without which no harm would have occurred *See Campos v. Ysleta Gen Hosp Inc*, 836 S.W 2d 791, 794 (Tex App -El Paso 1992, *writ denied*)

For summary judgment purposes, the District Court held, and the Fifth Circuit accepted, that Plaintiffs had established a "picture of missed opportunities" by all treating personnel so that t-PA was not administered when it should have App 13a Summary judgment was granted on the issue of causation. To prove causation, however, Texas does not require a plaintiff to establish causation in terms of medical certainty nor is he or she required to exclude every other reasonable hypothesis. *King v. Flamm*, 442 S W.2d 679, 682 (Tex 1969) The burden is to demonstrate, "by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the [injury] and without which the harm would not have occurred" *Park Place Hosp. v. Estate of Milo*, 909 S W 2d 508, 511 (Tex 1995) (quotation omitted) Reasonable inferences drawn from the evidence are permissible *Cruz ex rel. Cruz v Paso Del Norte Health Found*, 44 S.W 3d 622, 630 (Tex App.-El Paso 2001, *pet denied*) (citation omitted). Expert

medical testimony is utilized to assist the trier of fact in evaluating other evidence in the case. *Marvelli v. Alston,* 100 S.W.3d 460, 470 (Tex App -Fort Worth 2003, *pet denied*)

The issue of proximate causation in medical malpractice cases goes to the jury in Texas, when (1) general experience and common sense will enable layman fairly to determine the causal relationship between the event and the condition; (2) scientific principles, usually proved by expert testimony, establish a traceable chain of causation from the condition back to the event, and (3) a probable causal relationship is shown by expert testimony *Parker v Employers Mut. Liab Ins. Co of Wis* , 440 S W 2d 43, 46 (Tex 1969). Even otherwise inadmissible evidence from the non-moving party may be considered to defeat a summary-judgment motion *Duplantis v Shell Offshore, Inc* , 948 F 2d 187, 191 (5th Cir 1991). It is appropriate to consider all evidence before the court, including affidavits that conflict with deposition testimony, so long as it supports a genuine issue of material fact despite its "conflicts with earlier testimony in the party's deposition" *Dibidale of Louisiana, Inc. v. American Bank & Trust Co* , 916 F.2d 300, 307 (5th Cir 1990) (quoting *Kennett-Murray Corp v Bone*, 622 F 2d 887, 893 (5th Cir 1980))

Here, the record is replete with competent evidence raising a genuine issue of material fact Adoption of the 2.0 risk ratio factor, which replaced proximate-cause analysis with the drug's "absolute-benefit" percentage, was unwarranted Summary judgment was inappropriate

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 25, 2009

Appendix

APPENDIX

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Appendix A: Opinion of the U.S. Court of Appeals for the Fifth Circuit (June 29, 2009)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No 06-20709

RANDALL S YOUNG, THESSA G. YOUNG, Individually and as next friends of Ashton Young,

Plaintiffs–Appellants,

v

MEMORIAL HERMANN HOSPITAL SYSTEM, doing business as Memorial Hermann Hospital, RURAL/METRO OF TEXAS LP, MEMORIAL HERMANN HEALTHCARE SYSTEM, R/M OF TEXAS GP INC , RURAL/METRO OF TEXAS INC , JOSE MEDINA, MD, KATRIN Y. TAKENAKA, MD, STACY MACDONALD, RN, ALIE RIEDLE, RN,

Defendants–Appellees

Appeal from the United States District Court
for the Southern District of Texas

Before HIGGINBOTHAM, SMITH, and OWEN, Circuit Judges

PER CURIAM

Randall Young, his wife, and their minor child have asserted health care liability and derivative claims and appeal the district court's grant of

summary judgment in favor of the defendants (collectively, Memorial) on the element of causation We affirm.

I

Thirty-seven-year-old Randall Young, a Louisiana resident, attended a motocross event at Reliant Stadium in Houston, and during that event bystanders found him wandering aimlessly near a concession stand. Paramedics responded to a call at 8 34 p m and transported Young to Memorial Hermann Hospital, where he arrived at 9 20 p m It was later determined from a friend who had entered Reliant stadium with Young but was not seated with him that the last time Young was seen symptom free was about 6 30 p m or perhaps 6 45 p.m We will not detail the treatment Young received at Memorial or the results of various tests other than to note that a CT scan was initially "negative" for a stroke, but a subsequent CT scan was performed after 2:30 a m., and Young was diagnosed with a stroke at 4 15 a m

Whether Memorial should or could have diagnosed Young's stroke earlier and the appropriate course of treatment are hotly disputed. One of the Young family's chief contentions is that Memorial should have immediately diagnosed the stroke and should have administered an intravenous tissue plasminogen activator, known as t-PA In some cases t-PA can lyse or "bust" the clot that causes a stroke The Youngs contend that if Randall Young had received this drug within three hours of the onset of symptoms, he would have fully or substantially recovered It is undisputed that Young is severely and totally disabled as a result of his stroke.

The Youngs filed health care liability claims against Memorial Hermann Hospital and other defendants in the United States District Court for the Southern District of Texas, basing jurisdiction on diversity of citizenship The Youngs relied on opinions from three experts to support the causation aspect of their claims After these experts had submitted reports and were deposed, the Memorial defendants filed motions to exclude the experts' testimony on various grounds and filed a motion for summary judgment on the element of causation Ultimately, the district court granted Memorial's motion for summary judgment The court concluded that there was insufficient evidence to raise a fact question as to whether Young would have suffered less severe impairment if t-PA had been administered

The Youngs have appealed. We review the district court's grant of summary judgment de novo, applying the same standard that the district court applied.[1] Summary judgment is inappropriate if the record contains a genuine issue of material fact [2]

II

The parties agree that Texas substantive law governs The Texas courts have held that plaintiffs in a medical malpractice or health care liability suit must show a "reasonable medical probability" that "their injuries were caused by the negligence of one or more defendants "[3] This "mean[s] simply that it is

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[1] *Caboni v Gen Motors Corp*, 278 F 3d 448, 451 (5th Cir 2002)

[2] *Id*

[3] *Kramer v Lewisville Mem'l Hosp* , 858 S W 2d 397, 399-400 (Tex 1993)

'more likely than not' that the ultimate harm or condition resulted from such negligence."[4] The Supreme Court of Texas, like many courts, has equated the "more-likely-than-not" causation requirement to a more than 50% probability that a defendant's wrongful conduct caused the harm or injury.[5]

It is undisputed that there is reliable scientific evidence that timely administration of t-PA is beneficial to some patients, some patients do not benefit from t-PA therapy, and some stroke victims who do not receive t-PA recover, with little or no lasting impairment. We know that Randall Young was not treated with t-PA and that tragically, he did not recover significantly. Under Texas law, the Youngs must produce reliable evidence that it is more likely than not that Randall Young would have been among those patients who materially benefit from the administration of t-PA rather than among

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[4] *Id.* at 400, *see also Providence Health Ctr. v. Dowell*, 262 S.W.3d 324, 328 (Tex. 2008) (explaining, when failure to render treatment was alleged, that under the more-likely-than-not standard, "the issue is whether [treatment] would have made [the death or injury] unlikely").

[5] *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 715-17 (Tex. 1997) (concluding in a products liability case involving administration of a drug alleged to cause birth defects that "the requirement of a more than 50% probability means that epidemiological evidence must show [at least] that the risk of an injury or condition in the exposed population was more than double the risk in the unexposed or control population," citing numerous decisions and Judge Weinstein's seminal decision in *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1262 (E.D.N.Y. 1985), in which he held that the plaintiffs were required to offer evidence that causation was "'more than 50 percent probable'").

those who receive the therapy and do not benefit.[6]

The Youngs' best evidence lies in Table 3 of a 1997 "subgroup analysis" of an earlier, foundational 1995 study of t-PA's effectiveness.[7] Assuming, without deciding, that this subgroup analysis accurately reflects the effect of t-PA in the general population of patients, the relevant portion of this table suggests that in Young's age group and at his level of stroke severity, Young's likelihood of a very favorable outcome was approximately 42% even without t-PA treatment, while his likelihood of success with the treatment was approximately 59%

But as we have recognized, the law of Texas establishes the standard of causation as "more-likely-than-not," which means that it is more probable, i e more than 50% likely, that the alleged wrongful conduct caused the injury than not. The requirement that the wrongful conduct more likely than not caused the injury is the foundation for the conclusion in Bendectin litigation in Texas and other jurisdictions that causation had not been shown.[8] The issue in the Bendectin cases was whether the ingestion of that drug by women while pregnant caused birth defects in their children, specifically,

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[6] *See Providence Health Ctr.*, 262 S W 3d at 328, *Havner*, 953 S W 2d at 716-17, *Kramer*, 858 S W 2d at 400

[7] *See* Nat'l Inst of Neurological Disorders and Stroke rt-PA Stroke Study Group, *Tissue Plasminogen Activator for Acute Ischemic Stroke*, 333 NEW ENG J OF MED 1581 (1995), NINDS t-PA Stroke Study Group, *Generalized Efficacy of t-PA for Acute Stroke Subgroup Analysis of the NINDS t-PA Stroke Trial*, 28 STROKE 2119 (1997)

[8] *See Havner*, 953 S W 2d at 716 (citing decisions in other jurisdictions)

limb reduction defects.[9] It was undisputed that limb reduction birth defects occurred when mothers had not taken Bendectin.[10] The Supreme Court of Texas held that a plaintiff must show that it was more likely than not that Bendectin was a cause of the defects.[11] The more than 50% likelihood causation standard under Texas law was the basis for the Texas court's holding that generally, epidemiological studies must show at least a doubling of the risk.[12] "[T]he requirement of a more than 50% probability means that epidemiological evidence must show that the risk of an injury or condition in the exposed population was more than double the risk in the unexposed or control population."[13]

In the present case, the "unexposed or control population" consists of the patients who were treated with placebo in the NINDS study and the 1997 article analyzing it. Table 3 of the 1997 article reflects that in the category applicable to Randall Young, 58% treated with placebo had an unfavorable outcome, and 41% treated with t-PA had an unfavorable outcome. The failure to treat with t-PA did not result in a more than doubling of the risk of an unfavorable outcome. Thus even our most charitable reading of the Youngs' evidence cannot support a jury finding in their favor. In absence of a fact issue, we AFFIRM the summary judgment.

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[9] *Id.* at 708.

[10] *Id.* at 714.

[11] Id. at 715.

[12] *Id.* at 715-18.

[13] *Id.* at 716.

Appendix B: Order of the U.S. Court Of Appeals for the Fifth Circuit Denying Petition for Rehearing En Banc (August 27, 2009)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No 06-20709

RANDALL S YOUNG, THESSA G. YOUNG, Individually and as next friends of Ashton Young,
Plaintiffs–Appellants,

v

MEMORIAL HERMANN HOSPITAL SYSTEM, doing business as Memorial Hermann Hospital, RURAL/METRO OF TEXAS LP, MEMORIAL HERMANN HEALTHCARE SYSTEM, R/M OF TEXAS GP INC ; RURAL/METRO OF TEXAS INC , JOSE MEDINA, MD, KATRIN Y. TAKENAKA, MD, STACY MACDONALD, RN, ALIE RIEDLE, RN,

Defendants–Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion June 29, 2009, 5 Cir , ____, ____, F.3d ____)

Before HIGGINBOTHAM, SMITH and OWEN Circuit Judges.

PER CURIAM

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R APP P and 5th CIR R. 35), the Petition for Rehearing En Banc is DENIED

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED The court having been polled at the request of one of the members of this court and a majority of the judges who are in regular active service and not disqualified no having voted in favor (FED R APP P and 5th CIR R 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/Priscilla R Owen
United States Circuit Judge

Order on pet EB treat as pan reh-REHG6A

Appendix C: Opinion of the U.S. District Court for the Southern District of Texas-Houston Division (July 14, 2006)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RANDALL S YOUNG and THESSA G YOUNG, as next friends of ASHTON YOUNG	}	
	}	CIVIL ACTION NO
VS	}	H-03-1859
MEMORIAL HERMANN HOSPITAL SYSTEM, d/b/a MEMORIAL HERMANN HOSPITAL, MEMORIAL HERMANN HEALTHCARE SYSTEM, STACY MACDONALD R N., ALI RIEDLE, R.N., RURAL/ METRO OF TEXAS, L P , RURAL/ METRO OF TEXAS, G.P , INC , RURAL/METRO OF TEXAS INC OF TEXAS, INC , JOSE MEDINA, M D KATRIN Y TAKENAKA, M D	}	

MEMORANDUM OPINION ON MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court are a number of motions for summary judgment filed by the Defendants in this medical malpractice lawsuit, as well as a great number of additional motions. Memorial Hermann Hospital System, d/b/a Memorial Hermann Hospital, Memorial Hermann Healthcare

System ("Memorial Hospital Entities"), Stacy MacDonald, R.N., and Ali Riedle, R.N. have filed one motion (Instrument No 151) and Jose Medina, M D , and Katrin Y Takenaka, M D have filed another (Instrument No 176) The Rural/Metro Entities· Rural/Metro of Texas, L P , Rural/Metro of Texas, G .P , Inc., and Rural/Metro of Texas, Inc , have filed two motions, one contingent upon the other (Instruments No. 146 and 150) Instrument No 146 includes among other grounds, the grounds set forth in motions of the Memorial Hospital Entities, the medical doctors and the registered nurses

FACTUAL BACKGROUND

There is very little disagreement about the factual background of this case The Plaintiff, Randall S Young, who on March 29, 2003 had driven from his home in Louisiana to Houston to attend a Super-Motorcross Event at Reliant Station, was found wandering aimlessly in the area of the upper level concession stands. He was 37 years old Rural/Metro Event Emergency Medical Services were called at approximately 8 32 p m , and care was provided by an EMT and a paramedic employed by Rural/Metro. Rural/Metro transported Young to Memorial Hermann Hospital, and he arrived at the emergency room at 9 15 p m. Young was triaged by registered nurse Stacy MacDonald at 9.20 At 9 23 Nurse MacDonald sent Young to a treatment room where he immediately began receiving treatment by Jose Medina, M D , a first-year resident physician employed by the University of Texas Medical Foundation who was working that night in the Memorial Hermann Hospital's Emergency Department and Katrin Takenaka, M.D , an attending emergency physician employed by the

University of Texas Health Science Center, who was working that night in the Emergency Department at Memorial Hermann Hospital Nursing care was provided to Young by registered nurse Alie Riedle At 2.30 a m on March 30, 2003 Young was diagnosed with a stroke. He remained at Hermann Hospital for over a month and is severely and permanently disabled from the stroke

PLAINTIFFS' CONTENTIONS

Plaintiffs contend that Randall Young's stroke should have been timely and appropriately assessed, diagnosed, and treated by the Defendants, and that had he been timely diagnosed he would have met the inclusion criteria for treatment with a tissue plasminogen activator (tPA),[1] which, more likely than not would have meant a better outcome and a less severe deficit to his ability to function normally

DEFENDANTS' CONTENTIONS

Putting aside the many allegations of specific instances of negligence made against the various Defendants, this opinion focuses only upon the contention of the Defendants that as a matter of law there was a less than 51percent chance that Randall Young, had he met the inclusion criteria and been timely treated with tPA, would have benefitted from the treatment. Under Texas malpractice law, which rejects the "lost chance doctrine" as a cause of action, there is no liability for negligent medical treatment that deprives a patient of less than a 51percent chance of avoiding injury. *Cf Kramer v. Lewisville*

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[1] Marketed under the brand name Activase

Memorial Hospital, 858 S W 2d 397, 400-403 (Tex. 1993). Chief Justice Phillips put the issue in this way in the *Kramer* opinion "[W]hether there is liability for negligent treatment that decreases a patient's chance of avoiding death or other medical conditions in cases where the adverse result probably would have occurred anyway " 858 S W. 2d 398

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides "The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law " The moving parties have the burden of proving that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. The Court must view the evidence and the factual inferences from the evidence in the light most favorable to the nonmoving party and resolve all reasonable doubts about the facts in favor of the nonmoving party *Boston Old Colony Ins Co v Tiner Assoc , Inc* , 288 F 3d 222, 227 (5th Cir 2002) A material fact is one that can affect the outcome of the suit under the governing substantive law *Anderson v Liberty Lobby, Inc* , 477 U S 242, 248 (1986). A "genuine issue" is one that can be resolved only by a trier of fact because it may be resolved in favor of either party." *Anderson*, 477 U S. 248-49 If a reasonable juror could resolve the disputed fact in favor of the nonmoving party, then that fact is "a genuine issue of material fact " *Meadowbriar Home for Children,*

Inc v Gunn, 81 F 3d 521, 533 (5th Cir 1996)

ANALYSIS

To recover on their claims against all the Defendants, the Plaintiffs must prove as to each Defendant four elements **First**, Plaintiffs must prove that the Defendant had a duty to act according to applicable standards of care **Second**, Plaintiffs must prove that the Defendant breached the applicable standard of care **Third**, Plaintiffs must prove that Randall Young was injured **Fourth**, Plaintiffs must prove that there was a causal connection between the breach of care and the injury *Denton Regional Medical Center v LaCroix*, 947 S.W 2d 941, 950 (Tex App –Fort Worth 1997, *pet. denied*) For purposes of the motions for summary judgment the first three elements are conceded, and the focus is upon the fourth element, causation.

Ultimately, the standard of proof on the issue of causation is "whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the [injury] and without which the harm would not have occurred" *Park Place Hosp v Estate of Milo*, 909 S W 2d 508, 511 (Tex 1995) (quoting *Kramer*, 909 S W 2d at 511) Randall Young suffered an ischemic stroke, that is, a stroke caused by a blood clot None of the Defendants is alleged to have contributed to the onset of that stroke Rather, they are alleged to have failed to recognize his symptoms as being that of a stroke early enough to have allowed his stroke to be treated with the drug tPA, which, simply put, breaks up the blood clot Plaintiffs paint a largely uncontroverted picture of missed opportunities on

the part of the medical emergency personnel, the triage nurse, the emergency room doctors and nurses, and the readers of the CT scan to gain and process information about Young's condition that would have lead to the administering of tPA during the three hour time window from onset of his stroke The failure to timely diagnose the stroke resulted in the failure to administer the drug that Plaintiffs maintain deprived Young of the opportunity of lessening substantially the effects of the stroke. This delay in diagnosis, Plaintiffs' argue, breached the standard of care and was a substantial factor in causing Young's injury, that is, his physical disabilities, and without which he would not have suffered the physical disabilities Defendants argue that the delay in diagnosis of the stroke cannot be proved within reasonable medical certainty to be a cause of the physical disabilities Randall Young now suffers

Plaintiffs' evidence of causation consists entirely of the expert opinions of their three medical experts Peter G Bernard, M.D., a physician board certified in ten separate areas, including neurology, internal medicine, and electroencephalography; Paul M Katz, M.D , Medical Director of the Washoe Comprehensive Stroke Center in Reno, Nevada, and Guy G. Gansert, M.D a physician board certified in emergency medicine. In order to "constitute evidence of causation, a medical expert's opinion must rest in reasonable medical probability" *Tennyson v. Phillips*, No 12-02-00154-CV, 2004 WL 63158 (Tex. App –Tyler, Jan 14, 2004, *rev denied*) (citing *Burroughs Wellcome Co v. Crye*, 907 S W. 2d 497, 500 (Tex 1995)) "Reasonable medical probability" is established, when it becomes "more likely than not" that the condition or injury complained of resulted

from the event." *Id* There is no dispute that the effect of the reasonable medical probability standard is to allow recovery when the evidence indicates that there is "more than a fifty percent chance," that the injury complained of resulted from the negligence *Marvelli v Alston*, 100 S.W 3d 460, 480 (Tex App.– Fort Worth 2003, *rev. denied*)

Plaintiffs' experts contend that Young should have been given tPA because it would have improved his chances for a better neurologic outcome, but the statistics reported in reliable, peer reviewed medical literature and the deposition testimony of Plaintiffs' medical experts, demonstrate that tPA therapy offered less than a 51percent chance of avoiding the injuries caused by the stroke At their depositions the experts agreed that the 1995 NINDS study[2] was an authoritative scientific study It reported that tPA, when used correctly, provided an 11 to 13 percent increased chance of avoiding neurologic injury The percentage increase in the chance of a good outcome with tPA therapy is known as the "absolute benefit," which is calculated in the NINDS study by subtracting the percentage of patients that had a good outcome, but did not receive tPA from the percentage of patients that had a good outcome and did receive tPA. *New England J Med.* 333, 1581, Figure 2 at 1586 (1995), This finding is also reflected in the package insert for Activase, the trade name for tPA, which interprets the data from the NINDS study to demonstrate an 11 per cent increased

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[2] The National Institute of Neurological Disorder and Stroke rt-PA Study Group, Tissue plasminogen activator for acute ischemic stroke New Eng J Med (1995) 333 (attached as Exhibit I to Memorial Hermann, et al's Motion for Summary Judgment, Document No 151)

chance of good outcome with tPA. Exhibit K to Document No 151

Nevertheless, Plaintiffs' experts cited the NINDS study's "relative benefit" statistic, an approximate thirty-three per cent chance of having little or no neurologic deficit, three months after a stroke

Dr. Bernard testified in his deposition[3]

> Well again, my opinion, based on a reasonable medical certainty, is that had tPA been given he would have had a better chance in terms of outcome, that is at three months he would have had at least a 33 per cent better chance of outcome than had nothing been done And the question you're asking is whether he would have been normal had they given tPA, but I have concluded, as I report in my note and my dictation, that had tPA been given he would have had a better chance of having a better neurologic sequelae than he has had now, than we know he has had

Further, Dr Bernard admitted that Young had suffered an occlusion of the proximal middle cerebral artery and was thus less likely to benefit from tPA than other patients Exhibit L to Instrument No 151 at 275

Dr Gansert testified at his deposition "the

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[3] Exhibit L to Instrument No 151 at 175-76

initial studies–and I can't quote it, okay, I don't have it in front of me–but from my understanding in having heard lectures and read this previously that approximately a third of the patients, if I recall, had improvement at six months."[4] He admitted that it would be speculative to state that Young would have avoided the effects of his stroke if given tPA therapy. Exhibit U to Instrument No. 151 at 188

Dr Katz testified in his deposition[5] that "we don't know" whether or not Randall Young would have responded appropriately to tPA therapy

Thus, at their depositions, the Plaintiffs' doctors agreed that the chance of Young's symptoms of stroke improving with the timely administering of tPA was less than 51 percent

In response to the motions for summary judgment, Plaintiff obtained affidavits from these three doctors, which contradicted their deposition testimony on Young's chance of recovery with tPA treatment Defendants subsequently moved to strike (Instrument No. 259) the doctors' "sham" affidavits because it is law in the Fifth Circuit Court of Appeals that "this court does not allow a party to defeat a motion for summary judgment by using an affidavit that impeaches, without explanation, sworn testimony" *S W S. Erectors, Inc. V Infax, Inc*, 72 F 3d 489, 495 (5th Cir 1996); *Albertson v. T J Stevenson & Co*, 749 F 2d 223,228 (5th Cir. 1984) All three experts were deposed in September 2005 and

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[4] Exhibit U to Instrument No 151 at 186

[5] Exhibit V to Instrument No 151 at 97-98

were asked to identify and provide all relevant medical literature on which their opinions were based, but none of the doctors identified or provided the article they cited in their affidavits Dr Bernard testified at his deposition that he had brought a binder of approximately 26 articles on tPA, which he compiled as an "ongoing work" Exhibit B to Defendants' Motion to Strike, Instrument No 259 at pages 38-39, 40-42, 62-63, 65. Dr Bernard further testified that he had brought to the deposition references to "the articles that were relevant for me at that time when I concluded my report" *Id* at pages 65-66 Dr Katz testified at his deposition that he brought "his entire file on this matter," and did not withhold any materials responsive to the *subpoena duces tecum* Exhibit D to Instrument No 259 at pages 35, 64. Dr Gansert stated repeatedly at his deposition that he was not relying on any medical literature to form his opinion in the case Exhibit F to Instrument No 259 at 29-30. All three doctors were asked to provide all relevant literature, and all three said they had, but none provided or identified the article upon which their post-deposition affidavits were based Their explanations in the affidavits that they did not testify about the article because they were asked no questions about it are disingenuous These three affidavits could be stricken, as the Defendants move, or the Court could simply ignore them as inappropriate because contradictory to sworn testimony. The Court will ignore these affidavits, but even if they are considered, they do not defeat Defendants' summary judgment

The article found by the doctors after their depositions was said to identify a subgroup of the NINDS study, carved out by age and NIH stroke

scale score. This article, published in 1997 in the journal *Stroke*, is entitled "Generalized Efficacy of t-PA for Acute Stroke Subgoup Analysis of the NINDS t-PA Stroke Trial.[6] The page 1 Abstract of that article identifies its "Background and Purpose" as "to identify subgroups of stroke patients in whom thrombolytic therapy is particularly hazardous or efficacious." In the "Results" section, at page 5, the article states,

> Only age-by-NIHSSS interaction, diabetes, admission MAP-by-age interaction, and thrombus or hypodensity/mass effect on baseline CT scan were independently associated with favorable outcomes in this study None of these terms, however, had a significant interaction with t-PA treatment (from step 5). That is, each of the variables and interactions in Table 2 significantly influenced outcome, but none of them influenced the likelihood of differential response to t-PA

In layman's terms, the younger the patient, the more likely he will recover, but his youth does not have an impact on the efficacy of tPA treatment "No interactions with treatment were detected, implying that the variables listed influenced outcome independently of treatment Exhibit A to Instrument No. 209 at Table 2, at page 31.

Table 3 of the article, at page 31 of Exhibit A to Instrument No 209, forms the basis for Dr

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[6] Exhibit A to "Defendants' Reply in Support of their Motion for Summary Judgment, Instrument No 209

Bernard's affidavit statement, "Fifty-nine percent of the patients receiving tPA within this subgroup [patients less than or equal to sixty years of age with a baseline NIH stroke scale score of zero to nine] had a favorable outcome" Exhibit 5 to Plaintiffs Response to Defendants' Motion for Summary Judgment, Instrument No 195 Dr Katz's new analysis is similar "Assuming that Randy Young had an initial NIHSS of 7 as is indicated by Dr Pancioli, Defendants' expert, the study indicates that 59 percent of all patients less than 60 years old given tPA have a favorable outcome This is clearly greater than 50 percent" Exhibit 6 to Instrument No 195. Dr. Gansert's affidavit states, "I understand that subgroup analysis of the 1995 NINDS stroke study supports my opinion that Randy Young, more likely than not would have had a very favorable outcome had tPA therapy been administered to him. " Exhibit 3 to Instrument No. 195 The 59 percent statistic is flawed, however, because it does not identify the percent of patients benefitting from tPA treatment, but includes both patients benefitting from tPA treatment and patients spontaneously recovering, without benefit of treatment Table 3 of the article reveals that there were 46 individuals in the study who were sixty years old or younger and had an NIHSS score of 0-9 Fifth-nine percent of those treated with tPA had a good outcome, while 42 percent of those treated with placebo had a good outcome. In order to find the increased percentage of good outcome attributable to tPA, the placebo group (42 percent) must be subtracted from the tPA group (59 percent), for an increased chance of 17 percent

Plaintiffs argue in their Response to the Defendants' Reply to the Motion for Summary Judgment (Instrument No. 223) at page 7 that there

is no authority for the Defendants' use of "absolute benefit" percentages to replaces a proximate cause analysis The absolute benefit informs the proximate cause analysis, however, because ignoring the absolute benefit percentages ignores the accepted scientific methodology, a placebo control group, used to test a drug's efficacy When it has been demonstrated, in more than one scientific study, that an absolute benefit number can be established, it is against all reason to ignore that number in favor of the vague and unsupported "more likely than not" opinions based upon unspecified, untested, and unreviewed anecdotal evidence from the experience of the expert witnesses This, in essence, is what the Plaintiffs are asking the Court to do. No matter how many times Plaintiffs argue that they have not brought "lost chance" case, the undisputed facts are that they have. They have not and cannot show, as a matter of law, that Randall Young had a 51 percent or greater chance of avoiding his severely disabled condition had he received tPA treatment at Hermann Hospital on March 29, 2003. It is for that reason that the Court GRANTS the Defendants' Motions for Summary Judgment.

Signed at Houston, Texas, this 14th day of July, 2006

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE